Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

(2)

No. 94-570
In the Supreme Court of the United States
October Term, 1994

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner,

v

DEPARTMENT OF TREASURY AND
STATE BOARD OF ASSESSORS,
Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION CLAUSE REQUIRES THAT STATE-ASSESSED TELEPHONE COMPANIES BE GIVEN THE SAME PROPERTY TAX TREATMENT THAT STATE-ASSESSED RAILROADS ARE GIVEN CONSIDERING THE LIMITATIONS IMPOSED UPON THE STATE TAXATION OF RAILROADS PURSUANT TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT, 49 U.S.C. 11503.

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STATEMENT OF THE CASE

Pursuant to article 9, § 3 of the Michigan constitution, the Michigan legislature has provided for the uniform general ad valorem taxation of designated real and tangible personal property. This section of the Michigan constitution also provides that "[E]very tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." (See Pet. App. 14a) The ad valorem property taxation of telephone companies and other designated public service companies, which includes railroads, is governed by article 9, § 5 of the Michigan constitution and is imposed pursuant to 1905 P.A. 282, Mich. Comp. Laws Ann. § 207.1 et. seq. (Act 282). As indicated by the Michigan Supreme Court in its opinion in this case, the

tax imposed by Act 282 is not a "general" ad valorem property tax which, under Michigan law, would require the same taxing treatment to all to whom it applies. Rather, the tax imposed under Act 282 is a tax "other than the general ad valorem property tax" (See Pet. App. 12a) which Michigan and federal law would require to be uniform or equal as to that class or classes upon which it operates. Contrary to the assertions of Petitioner, Act 282 does not indicate that telephone companies and railroad companies are in the same "class", so as to require identical treatment for state taxation purposes.

The basic facts in this case are stated in the opinions of the Michigan Supreme Court and the Michigan Tax

Tribunal. Summarized, the basic facts of the case are as follows:

In 1984, Petitioner filed its petition appealing its 1984 assessment under Act 282 to the Michigan Tax Tribunal. The petition was later amended to include the 1985 and 1986 tax years. The petition made no reference to any constitutional violation, either state or federal, in the assessments established by Respondents.

During the months of August and September of 1987, the Michigan Tax Tribunal heard 20 days of testimony. There was no evidence presented at the Tax Tribunal that assessments under Act 282 for railroads were computed any differently than were assessments for telephone companies. In fact, the only

testimony on this subject was that assessments for railroad companies were computed the same as were assessments for telephone companies.

Subsequent to the close of proofs, the parties filed their respective briefs and replies. Petitioner's briefs did not indicate that the assessments at issue were being assailed because of a perceived unequal treatment between railroad companies and telephone companies. Petitioner did indicate, in four short paragraphs of its 117-page Trial Brief Relating to Valuation, that it felt the inclusion of intangibles in its assessments, while intangibles were excluded from the assessments of entities subject to Michigan's General Property Tax, violated both the state and federal constitutions.

While it is admitted that the Tax Tribunal is a "quasi-judicial agency" of limited jurisdiction, Petitioner's assertion at page 4 of its Petition For Writ of Certiorari that the Tax Tribunal lacks the power to determine constitutional issues is simply wrong. As indicated in the case of Wikman v. Novi, 413 Mich. 617, 646-647; 322 N.W.2d 103, 114 (1982), the Tax Tribunal lacks the authority to declare a statute unconstitutional. The Tax Tribunal does however have the authority to evaluate claims couched in constitutional terms to determine the validity of matters within its jurisdiction. Town and Country Dodge, Inc. v. Michigan Department of Treasury, 118 Mich. App. 778; 325 N.W.2d 577 (1982), Johnston v. City of Livonia, 177 Mich. App. 200; 441 N.W.2d 41 (1989).

On March 13, 1990, the Tax Tribunal issued its Opinion and Judgment as to the valuation aspect of the case. On March 23, 1990, an Errata to its earlier Opinion and Judgment was entered by the Tax Tribunal. Neither the initial Opinion and Judgment nor the Errata made any mention of Petitioner's constitutional argument. The Tax Tribunal noted on page 3 of its March 23, 1990 Opinion and Judgment that only those issues of "decisional significance" were discussed.

Petitioner subsequently filed a Claim of Appeal with the Michigan Court of Appeals. In its initial brief to the Court of Appeals, Petitioner again indicated that it felt the ruling of the Tax Tribunal requiring the inclusion of

intangibles in its assessments, while taxpayers subject to Michigan's General Property Tax did not have their intangibles included, violated the Michigan and federal constitutions. It was not until October 31, 1991 when Petitioner requested permission from the Michigan Court of Appeals to file a supplemental brief that Petitioner articulated the equal protection argument that it now presents to this Court; that being that the inclusion of intangibles in the tax base of Petitioner, when supposedly intangibles are not to be included in the tax base of Railroads pursuant to the 4-R Act, somehow violates the Equal Protection Clause of the U.S. Constitution. On November 6, 1992, the Michigan Court of Appeals issued its memorandum opinion affirming the determination of

the Michigan Tax Tribunal. Petitioner's constitutional arguments raised in its supplemental brief were not discussed.

Subsequent to the issuance of the memorandum opinion of the Michigan Court of Appeals, Petitioner sought leave to appeal to the Michigan Supreme Court. One of the issues upon which Petitioner sought leave was its contention that the inclusion of intangibles in its tax base, when supposedly intangibles are not to be included in the tax base of railroads under the 4-R Act, infra, was constitutionally impermissible. While the Michigan Supreme Court did grant Petitioner's Application For Leave To Appeal, the appeal was limited to the sole issue of whether, under Michigan law, intangibles were to be included in Petitioner's tax base under Act 282.

On June 21, 1994, the Michigan Supreme Court issued its opinion in this case, holding that the inclusion of intangibles in the tax base of Petitioner was required by Michigan law. The Michigan Supreme Court did not address Petitioner's equal protection challenges. On August 2, 1994, the Michigan Supreme Court denied Petitioner's Motion For Rehearing.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF EQUAL PROTECTION BETWEEN TAXPAYERS SUBJECT TO TAXATION UNDER ACT 282 WAS NOT RAISED IN THE TRIAL FORUM, OR CONSIDERED OR DECIDED BY AN APPELLATE COURT AND THUS CAN PRESENT NO CONFLICT OF DECISIONS FOR THIS COURT TO REVIEW.

Petitioner argues that it is a denial of equal protection to subject its intangibles to tax when supposedly the intangibles of railroads are not subject to tax. Petitioner's equal protection argument at the Tax Tribunal was limited to the question of whether it was a violation of equal protection to treat taxpayers differently under Act 282 than they would be treated if they were to be taxed under Michigan's General Property Tax Act and was not raised by Petitioner until after the trial of the cause.

The question as to whether it would be a violation of equal protection to treat taxpayers who were both subject to Act 282 in a different manner, was not raised as a legal issue until Petitioner filed its Motion For Leave To File a Supplemental Brief in the Michigan Court of Appeals. The Michigan Court of Appeals, in its decision in this case, did not discuss Petitioner's equal protection argument at all. Likewise, the Michigan Supreme Court did not accept Petitioner's equal protection issue as an issue to be decided on appeal. The only constitutional issues discussed by the Tax Tribunal or Michigan appellate courts below were issues of Michigan constitutional law dealing with the inclusions of intangibles in the tax base of Petitioner. There was no dis-

cussion of violations of the United States Constitution. Simply put, the federal question Petitioner is now asking this Court to review was neither properly raised nor decided in any of the lower courts, which is a prerequisite to this Court considering the issue. Godchaux Co. v. Estopinal, 251 U.S. 179; 48 S. Ct. 116; 73 L. Ed. 213 (1919), Beck v. Washington, 369 U.S. 541; 82 S. Ct. 995; 8 L. Ed. 2d 98 (1962). In Michigan, legal issues must be raised at the trial forum. If they are raised for the first time on appeal, which was the case here, the appellate court generally refuses to consider the issue. Allied Building Credits, Inc. v. Mathewson, 335 Mich. 270, 275; 55 N.W.2d 826, 828 (1952).

Additionally, in order for this Court to have the jurisdiction to consider the issue presented by Petitioner, it is clear that the decision of the courts below must be based upon federal grounds. If the decisions below are based solely upon independent and adequate state grounds, this Court lacks the jurisdiction to hear the matter. Hub v. Pitcairn, 324 U.S. 117; 65 S. Ct. 459; 89 L. Ed. 789 (1945).

Because of the above, no substantial federal question is presented in this case and this Court lacks the requisite jurisdiction to hear this case under 28 U.S.C. § 1257.

II.

PETITIONER HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAWS NOR BEEN TREATED IN A MANNER NON-UNIFORM WITH THAT OF OTHER TAXPAYERS IN ITS CLASS.

Petitioner contends that the equal protection guarantee of the United States constitution prohibits the inclusion of intangibles in its tax base under Act 282. Petitioner's argument in this regard is based upon the assumption that the tax levied on Petitioner under Act 282 must be precisely the same as the tax levied against all other taxpayers subject to Act 282. This is not the law in Michigan or under the United States constitution.

It is a well settled rule, in both federal and Michigan law, that different taxing treatment of different classes of

taxpayers is not a violation of the equal protection provision of the federal or Michigan constitutions. W S Butterfield Theater, Inc. v. Dep't. of Revenue, 353 Mich. 345; 91 N.W.2d 269 (1958); Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, 308 Mich. 198; 13 N.W.2d 269 (1944); Bell's Gap R Co. v. Pennsylvania, 134 U.S. 232; 10 S. Ct. 533; 33 L. Ed. 892 (1890); Southwestern Oil Co. v. Texas, 217 U.S. 114; 30 S. Ct. 496; 54 L. Ed. 688 (1910). The only condition is that the differentiation between the classes be reasonable, or that any state of facts reasonably can be conceived to sustain it. Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, supra, Tomlinson v. Tomlinson, 338 Mich. 274; 61 N.W.2d 102

(1953); American Sugar Refining Co. v. Louisiana, 179 U.S. 89; 21 S. Ct. 53; 45 L. Ed. 102 (1900). Additionally, in order for Petitioner to prevail on its claim it must negate every conceivable basis which might support the legislatively determined classes. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973), W S Butterfield Theater, Inc. v. Dep't. of Revenue, supra, and American Amusement Co. v. Department of Treasury, 91 Mich. App. 573; 282 N.W.2d 803 (1979) app. dis. 446 U.S. 931; 100 S. Ct. 2145; 64 L. Ed. 2d 783.

In the instant case, there has been no evidence presented, nor could there be, that Petitioner is treated any dif-

ferently than any other taxpayer in its class--that being telephone companies subject to tax under Act 282. Equal protection requires no more.

III.

THE MICHIGAN LEGISLATURE AND THE UNITED STATES CONGRESS MAY CONSTITUTIONALLY AFFORD DIFFERENT TAXING TREATMENT TO DIFFERENTLY SITUATED TAXPAYERS.

As noted earlier it is not a denial of equal protection to treat differently situated taxpayers in a different manner. There is no question under either Michigan or federal law that taxpayers subject to tax under Michigan's General Property Tax Act may be treated differently than those taxed under Act 282. Likewise, there may be disparate tax treatment afforded taxpayers who are subject to the same tax, other than

Michigan's General Property Tax, again--as long as the distinctions drawn between the taxpayers are reasonable.

For example, in Act 282, railroads are afforded a credit against their tax equal to 25% of the amount expended for the maintenance or improvement of rights of way. 1905 P.A. 282, § 13. Mich. Comp. Laws Ann. § 207.13. This credit, in effect, relieves almost all railroads in Michigan from paying <u>any</u> tax under Act 282. No other taxpayer under Act 282 has the benefit of such a credit, yet this does not result in a denial of equal protection. It is an example of the Michigan Legislature deciding that railroads should be afforded tax treatment different from other taxpayers under Act 282. As there are reasonable

distinctions between railroads and other taxpayers under Act 282, this disparate tax treatment does not violate equal protection guarantees.

Likewise, the federal government has decided that there was a possibility that railroads were being discriminated against in the manner in which they were being subjected to the various state property taxes. The United States Congress reacted to this perceived discrimination by passing the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 (the 4-R Act) which allows railroads, the opportunity to contest their state property taxes in federal court. The United States Congress has not seen fit to afford tele-

phone companies the same opportunity.[1]

If a railroad doing business in Michigan feels that its tax burden under Act 282 is discriminatory, it may, under the 4-R Act, appeal such tax to federal court.[2]

This opportunity simply supports the premise that differently situated taxpayers, subject to tax under Act 282, may be treated differently with no equal protection violation. If a railroad has a cause of action under the 4-R Act, that does not mean that another taxpayer under Act 282, not subject to the 4-R Act, can follow along.

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[1]There have been proposed legislative changes that would have included telephone companies within the 4-R Act. None of these proposals have passed.

[2]To date there have been no such appeals by railroads in Michigan.

The tests applied to one assailing the constitutionality of a state statute on equal protection grounds under either state or federal constitutions is stringent. As this Court stated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78; 31 S. Ct. 337; 55 L. Ed. 369 (1911):

> The rules by which this contention [equal protection violation] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the

> law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

The Petitioner has in no wise met the test. The state and federal constitutions do no more than require that those who are members of the same class be treated uniformly, for tax purposes or otherwise. Quite simply, railroad companies and telephone companies may, for tax purposes, be treated as belonging to different classes. No constitutional proscription is violated by doing so.

Differently situated taxpayers may be treated differently. Taxpayers subject to tax under Michigan's General Property Tax Act may be treated differ-

ently than those taxed under Act 282. Differently situated taxpayers subject to tax under Act 282 may be afforded different tax treatment. Railroads could be treated differently from telephone companies, and both could be treated differently than, for example, car leasing companies. As long as the legislatively created distinctions are reasonable, there is no denial of equal protection. In the instant case Petitioner is treated the same as all other telephone companies doing business in Michigan and subject to tax under Act 282.

IV.

THE DECISION OF THE MICHIGAN SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioner argues that the holding of the court below conflicts with the

decision of the Nebraska Supreme Court in Northern Natural Gas Co. v. State Board of Equalization & Assessment, 232 Neb. 806; 443 N.W.2d 249, cert. den. 493 U.S. 1078 (1990). While it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property, this case stands alone in the premise that the tax treatment afforded railroads under the 4-R Act must be extended to other entities subjected to like taxes. The Supreme Courts in other states where this issue has been addressed have ruled that equal protection guarantees do not require that the favorable tax treatment afforded railroads under the 4-R Act be extended to other taxpayers paying the same tax.

For example, in Federal Express Corp. v. Tennessee State Board of Equalization, 717 S.W.2d 873 (Tenn. 1986), the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55% rate applicable to public utility property rather than the 30% rate applicable to commercial and industrial property. In rejecting the contention that the federal equal protection clause precluded the state from assessing the taxpayer's property at the rate applicable to utility property while assessing railroad property at the lower rate applicable to commercial and industrial property, the court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial

and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In Alabama v. Colonial Pipeline Co., 471 So.2d 408 (Ala. Civ. App. 1984), app. den. 474 U.S. 936 (1985), the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. The property of railroads had been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-R Act. In its opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of

pipelines, on the one hand, and railroads, on the other, would violate the federal equal protection guarantee even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Federal Express and Colonial Pipeline hold that the 4-R Act has created a classification scheme that is binding on the states. So long as that classification scheme has a rational basis (the revitalization of the railway system, Oregon Revenue Dep't. v. ACF

Industries, Inc., 510 U.S. ___, ___; 114 S. Ct. 843; 127 L. Ed. 2d 165 (1994)), no substantial equal protection attack can be levied against the classification. And this is so, regardless of how the states might have originally classified the property in question.

In the case of Kennecott Corp. v. Utah State Tax Commission, 858 P.2d 1381 (Utah 1993), the Utah Supreme Court rejected the argument that state-assessed taxpayers are entitled to the same tax treatment under the equal protection clause as accorded to "similarly situated" state-assessed railroads covered under the 4-R Act (the same argument made by Petitioner). The court stated that to establish an equal protection violation, a party must demon-

strate that the law creates a certain class of persons who are similarly situated and must show that the law is applied differently to members of the class without a reasonably related legitimate government purpose. The court found that the 4-R Act was a distinguishing factor in determining that the railroads and Kennecott were not similarly situated. See also ANR Pipeline Co. v. Director of Property Valuation, 254 Kan. 534; 866 P.2d 1060 (Kan. 1994), cert. den. October 3, 1994, 1994 U.S. Lexis 6979.

CONCLUSION

In this case, the forums below decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor was a federal question decided in a way that conflicts with the decision of another court of last resort. In fact, neither the Michigan Tax Tribunal, nor the Michigan Court of Appeals nor the Michigan Supreme Court addressed a federal question at all. Nor did the forums below address Petitioner's equal protection argument presented in the instant petition. Notwithstanding this, it is clear that the taxing treatment afforded Petitioner by the State of Michigan under Act 282 does not impinge upon Petitioner's federal guarantees of equal protection of the laws.

RELIEF SOUGHT

For these reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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